

THE HONORABLE RICHARD A. JONES

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION**

ROBERT MEEKER AND AMY MEEKER,
individually, the marital community comprised
thereof, and on behalf of C.M., a minor,
Plaintiffs,

VS.

STARFISH CHILDREN'S SERVICES,
PATRICK MCLAUGHLIN and CYNTHIA
MCLAUGHLIN and the marital community
comprised thereof, MICHAEL BOSMANN
and LISA ANN BOSMANN and the marital
community comprised thereof, and JANE
DOES 1-2.

Defendants.

NO. 2:17-cv-000376-RAJ

**PLAINTIFFS' SURREPLY ADDRESSING
DEFENDANT'S UNWARRANTED
CONTENTION THAT PLAINTIFFS'
RULE 12(B)(6) RESPONSE CONCEDES
THAT DISMISSAL IS APPROPRIATE ON
ALL CLAIMS SOUNDING IN
NEGLIGENCE**

Noting date: July 28, 2017

TO THE HONORABLE COURT:

Pursuant to LCR 7(g), Plaintiffs respectfully move to strike the portions of Defendant's Reply brief that incorrectly state or imply that Plaintiffs have somehow conceded all causes of action against Defendant Bosmann sounding in negligence.

1 In his Reply, Defendant repeats *ad nauseam* words to the effect that “Plaintiffs
 2 have ratified the Bosmanns’ position that they are not subject to [any] claims [arising
 3 from] ordinary negligence or negligent misrepresentation.”¹ This is incorrect, yet again.

4 Defendant’s position arises from a patent misunderstanding of Plaintiffs’
 5 argument and/or the effect of RCW 4.24.264 on claims against non-profit board
 6 members. Either way, a brief clarification is appropriate.

7 Plaintiffs have not conceded or ratified that ordinary negligence is insufficient to
 8 sustain *some, any, or all* of the claims pleaded against Bosmann in the Complaint. On
 9 the contrary, Plaintiffs devoted significant attention to discussing *negligent* wrongful
 10 adoptions and related claims,² and explaining, *inter alia*, that Defendant’s *own* citations
 11 to *McKinney v. State*³ recognize that “[t]he negligent failure” —of an adoption
 12 placement agency *or* an individual like Bosmann⁴—“to comply with the statutory
 13 disclosure mandate to prospective adoptive parents may result in liability.⁵

14 Defendant misunderstands RCW 4.24.264.⁶ The Reply says that the plain
 15 language of RCW 4.24.264 indicates (and that Plaintiffs concede) that “nonprofit board
 16 members are liable to third parties for discretionary decisions only if the decision or
 17 failure to decided ‘constitutes *gross* negligence.’”⁷ Even if board members cannot be
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19 ¹ See, e.g., Doc. #27 at 1 and 3. See *id.* at 4 (claiming that Plaintiffs have ceded Defendant’s entire 12(b)(6)
 motion save for gross negligence, IIED, and fraud).

20 ² E.g., Doc. #25 at 12 (explaining that Texas likely recognizes a wrongful adoption tort based on both negligence
 or intentional misconduct); *id.* at 13 (discussing *McKinney v. State*, which first recognized wrongful adoption in the
 negligence context); *id.* at 21-22 (explaining that in itself, breach of the statutory disclosure requirement is evidence
 of the Defendant’s negligence).

22 ³ *McKinney v. State*, 950 P.2d 461 (Wash. 1998).

23 ⁴ See, e.g., RCW 26.33.350(1) (extending the statutory disclosure requirement not just to agencies but to “*every person* firm, society, association, corporation, *or* state agency receiving, securing a home for *or otherwise caring* for
 a minor child [prior to adoption].”)

24 ⁵ *McKinney v. State*, 950 P.2d at 462 (emphasis added).

25 ⁶ See Doc. #27 at 4 (asserting that RCW 4.24.264 immunizes board members entirely from *any and all* claims
 sounding in “ordinary,” rather than “gross,” negligence).

26 ⁷ Doc. #27 at 5 (emphasis added) (quoting RCW 4.24.264(1)).

1 liable for ordinary negligence when they are executing *discretionary* oversight with a
2 non-profit, complying with the adoption disclosure mandates in, e.g., RCW 26.33.350
3 is not discretionary it is mandatory and when someone covered by the statute *fails* to
4 abide the disclosure requirements *negligently* (or otherwise) they are liable.

5 Perhaps Defendant may not be liable for his truly *discretionary* actions as a
6 board member even if they evince ordinary negligence, but that is irrelevant. The
7 Complaint alleges (in the alternative) that Defendant(s) acted negligently in failing to
8 discharge *non-discretionary* duties under the adoption disclosure statute, and Plaintiffs'
9 Response does not diminish this one iota. Negligence combined with, *e.g.*, failure to
10 fulfill RCW 26.33.350's disclosure mandate presents a viable cause of action.
11 Accordingly, Plaintiffs move to strike Defendant's contention that they have conceded
12 all claims sounding in negligence.

13 | Dated: August 3, 2017

Respectfully Submitted,

/s/ James L. Mitchell
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1 **CERTIFICATE OF SERVICE**
2

3 I hereby certify that a true and correct copy of the foregoing instrument has this
4 date been sent to all attorneys of record in the above-styled and numbered matter, said
service being effected by e-service of e-filed documents pursuant to LCR 5.
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6 DATED: August 3, 2017
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8 */s/ James L. Mitchell*
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